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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

CSAA INSURANCE EXCHANGE, Plaintiff, Cross-defendant, and Respondent, v. OSCAR HERRERA, Defendant, Cross-complainant, and Appellant.	A153429 (Contra Costa County Super. Ct. No. C14-01196)

Oscar Herrera appeals an adverse summary judgment determining that CSAA Insurance Exchange (CSAA) had no obligation to defend or indemnify Thomas Bennett for claims arising from his having shot Herrera during an attempted armed robbery. The trial court did not err and we shall affirm the judgment.

Background

The undisputed facts establish that on the evening of December 3, 2009, Bennett—apparently under the influence of alcohol and drugs—armed himself with several loaded handguns, drove to the Alamo Jewelry Mart owned by Herrera, and subsequently pleaded nolo contendere to attempted second degree robbery of Herrera (Pen. Code, §§ 211, 664) enhanced for the personal discharge of a firearm (Pen. Code, § 12022.53, subd. (c)), for which he received a 23-year prison sentence.[1] It is also undisputed that one or two weeks earlier, Bennett, who was in financial distress, had

[1] Bennett was also charged with attempted murder (Pen. Code, §§ 187, 164), which charge was dismissed as part of the plea agreement.

asked Herrera to obtain for him a large diamond he was considering purchasing for his wife. Herrera contacted Bennett when the diamond arrived and the two arranged to meet at Herrera's store. At the store, after some interchange, Bennett pointed a semi-automatic handgun at Herrera and stated, according to Herrera's account in a contemporaneous police report, "I'm sorry I have to rob you." In his grand jury testimony, Herrera said Bennett's words were, "I'm sorry, but I have to do it. I have financial problems and I really — I need to do it." According to the police report, Herrera told the officer that before any shootings, Bennett told him, "I really fucked up" and said that he would leave and not rob him if Herrera did not call the police. Bennett then appeared to retrieve a second gun from his ankle, checked the gun to see if it was loaded, a bullet ejected from the chamber of the gun and Bennett then said, "Well, fuck you," and fired at Herrera, striking him in the chest. Herrera "began to run around his store to escape from Bennett," begging Bennett to stop shooting. "Bennett continued to chase Herrera and point[ed] the gun at him several times. . . . Herrera then fled through his office and into a shop area behind the office. At one point Herrera attempted to close the door to his shop, but Bennett forced it open, continuing to shoot at him." Herrera was wounded a second time, in the abdomen. However, he was able to retrieve his own gun, he shot and wounded Bennett, and Bennett was arrested.

At his deposition years later, Herrera described events somewhat differently. According to his deposition testimony, when Herrera first turned and saw Bennett pointing a gun at him, he asked, "Hey, what are you doing? What the heck are you doing?" and Bennett put the gun away in his coat pocket. The two proceeded to talk for 15 to possibly 25 minutes, and Bennett appeared to abandon his demand for the diamond.[2] Eventually Bennett backed up towards the door on his way out without the

[2] In his grand jury testimony, Herrera described the conversation in part as follows: "he looked at me and he lower a little bit, his side lowered, like embarrassed, and said, 'You are a very nice person. I don't know why I'm doing this to you.' And he says, 'You're really a gentleman.' And he says, 'You're an angel.' And that's when he started lowering his gun and he says, 'I'm sorry, I really didn't mean to hurt you. I'm sorry.' And he started putting his gun right here (indicating) in his jacket. . . . I said, 'You know, that's

diamond. At the door, Herrera testified at his deposition, another gun fell from Bennett's pants leg, Bennett insisted on showing him that the gun was not loaded, was surprised to find that it was, and while slamming the clip back into the gun it unintentionally discharged, hitting Herrera in the chest. Then, according to the deposition testimony, Herrera somehow got to his office and tried closing the office door to keep Bennett out but Bennett, holding a gun, got his arm through the opening and, as they struggled over the gun, Herrera was shot a second time; three additional bullet holes were later observed in the office. Herrera reached for a gun of his own and shot at and wounded Bennett. Herrera called 911, Bennett was taken into custody, and both he and Bennett were taken to the hospital.[3]

On December 31, 2009, Herrera filed a personal injury action against Bennett on a Judicial Council form complaint alleging negligent, reckless and intentional tort claims. Bennett tendered defense of the action to CSAA, seeking coverage under his homeowners policy. On January 15, 2010, based on the advice of counsel, CSAA declined coverage.[4] In May, in a lengthy letter, Bennett's attorney again demanded a

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not the way of life, you know, if you have problems, you know, there's a lot of help right here.' [¶] . . . I was really speaking to him with a lot of passion. 'Please, if you kill me, you will mess up my family and you will mess up your family, too.' [¶] . . . [¶] That's when he said, you know, 'I'm an idiot,' and I say, 'No, you are not. . . .' [H]e says, 'I really have to shoot myself,' he says, 'but if I commit suicide, I will be worth a shit, but if somebody kills me, I would be worth $5 million.' And he says, 'My children and my wife, they will be set for life.' "

[3] In his earlier grand jury testimony, Herrera had also indicated Bennett was apparently surprised when he discovered that the gun that fell from his pants was loaded and when it "went off," but he also related that Bennett then continued to shoot at him and tried to force his way into his office, while he pleaded, "Please don't kill me, please don't kill me and go away."

[4] The letter from CSAA's attorney explained its understanding of the basis for the claim as follows: "Mr. Herrera seeks to recover compensatory and punitive damages from you and your business for injuries he sustained on December 3, 2009, when you fired a weapon at him in the course of attempting to rob his store, Alamo Jewelry Mart. Mr. Herrera was wounded in the chest and abdomen. [¶] According to the news articles, you have been charged with attempted murder, attempted robbery, second degree commercial burglary, possession of a silencer, and two enhancements, use of a gun in

defense, explaining that because of mental and physical problems from which Bennett had been suffering, he had been under the influence of medications that rendered him "incapable of formulating the requisite intent to commit an intentional act," and in addition he "partook [of] alcohol . . . concurrent with the medications in a failed attempt to ease the pain, depression and general state of panic . . . during the prior 8 months, before the date of loss." Therefore, the letter argued, "no one can state with any certainty your insured had any intent to injure Mr. Herrera, and certainly not given the circumstances surrounding Mr. Bennett's (then) current life situation." The letter referred to the conversation between Bennett and Herrera before the first shooting, asserting that "in your insured's dazed and confused state of mind, he failed to realize there was a bullet in the chamber [of the second gun], and unfortunately, this bullet discharged and hit Mr. Herrera. There is no evidence your insured ever had any requisite or premeditated intent to use the gun on Mr. Herrera or even appreciated what the risks were in carrying two guns into a store." Counsel for CSAA responded, asserting that the propriety of its denial of coverage was confirmed by review of the police report of the incident, and that the only new facts in the letter from Bennett's attorney concerned his health and medications and did not show that his conduct on December 3, 2009 was accidental. The response also pointed out that it had not been possible to interview Bennett personally because of his incarceration and pending criminal charges.

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commission of a crime and inflicting great bodily injury on a person during the commission of a crime. It is CSAA's understanding that a few days before the incident, you asked Mr. Herrera to order some 4.0 and 4.5 carat diamonds so that you could select a new stone for your wife. It is alleged that on the night of December 3, you armed yourself with three guns from your personal collection, including a homemade silencer, and attempted to rob the Mart. Although wounded, Mr. Herrera was able to grab his own weapon and return fire. It is CSAA's understanding that you suffered wounds to your wrist, neck and mouth, but that you are recovering from your injuries. After the police arrived, you initially refused to surrender to the officers, but eventually did so. According to the deputy district attorney, investigators found that the license plates on the truck you drove that night had been removed and they found a videotape at your home with instructions on how to survive a gun battle."

In June 2010, Bennett and his wife initiated bankruptcy proceedings and obtained a discharge of their debts.[5]

In November 2012, Herrera filed an amended complaint against Bennett, alleging only a negligence claim.[6] In November 2013, in an uncontested default hearing, Herrera obtained a judgment against Bennett for $3,689,361. In exchange for a covenant not to execute on the judgment, Bennett assigned his rights under the CSAA policy to Herrera, and Herrera demanded that CSAA pay the entire judgment. CSAA then filed the present action seeking a declaration that there was no potential coverage under its policy, and that it was under no duty to provide a defense or indemnity. Herrera filed a cross-complaint alleging breach of the insurance policy and bad faith.

The trial court granted CSAA's motions for summary judgment on the complaint and on the cross-complaint. The court ruled that "Herrera at most creates a factual dispute as to whether the first shot was an accident. The court assumes a factual dispute as to the first shot, but nevertheless finds that sufficient undisputed facts exist to show that Bennett's preparation for the attempted robbery precludes Herrera from coverage. [¶] . . . [¶] Based on the undisputed material facts, the court finds that the course of events in question was not an accident. The undisputed facts make clear that Bennett's preparation for the attempted robbery was willful." Analogizing the facts here to those in *Interinsurance Exchange v. Flores* (1996) 45 Cal.App.4th 661, the court found that "the facts show that Bennett knew that injury was likely to result from his planned attempted robbery as evidenced from the fact that he gathered three handguns and two knives and brought them with him to the jewelry store." Rejecting Herrera's argument that summary

[5] Among additional grounds on which CSAA moved for summary judgment was that Herrera did not preserve his claim in the bankruptcy proceedings. The trial court did not rule on this ground and the parties do not address it on appeal.

[6] The amended complaint alleges: "At all times relevant, defendant Thomas Paul Bennett involuntarily, mistakenly, accidentally, and/or without the knowledge that his acts, omissions, and/or conduct were wrongful, unintentionally and/or negligently shot and injured plaintiff Oscar Herrera. [¶] The purpose of this action and cause of action is to establish liability as a precondition to recovery from defendant Thomas Paul Bennett's homeowners liability insurer . . . ."

judgment was inappropriate because of the factual dispute as to whether the first gunshot was an accident, the court cited *Studley v. Benicia Unified Sch. Dist.* (1991) 230 Cal.App.3d 454 and held that "here, Bennett had a preconceived plan that created a high probability of injury resulting. Whether or not an inadvertent shot occurred within the course of executing that plan is irrelevant in determining coverage for the incident as a whole." The court also cited *Studley* in support of its additional conclusion that coverage is barred by Insurance Code section 533, which prohibits coverage for "a loss caused by the willful act of the insured." Finally, the court ruled that CSAA did not breach the duty to provide a defense based on the potential for coverage because it acted on the advise of counsel and "performed a sufficient investigation of the facts, thereby establishing that there was no potential liability under the policy."

Herrera timely appealed from the resulting adverse judgment.

Discussion

At the time of the attempted robbery, Bennett held a homeowners insurance policy issued by CSAA that provided coverage for damage claims against him because of personal injury caused by an "occurrence," defined to mean "an accident." There is no dispute about the meaning of an "accident," as defined in, among many cases, *Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302, 308 (" ' "an unexpected, unforeseen, or undesigned happening or consequence from either a known or unknown cause" ' "). In *Delgado*, the Supreme Court held that an insured's assault and battery was not an accident triggering the insurer's duty to defend under a homeowners policy even if the insured struck the victim under the negligent and unreasonable belief that he was engaging in self-defense. So too here, there is no dispute that if Bennett shot Herrera while attempting to rob him, Bennett's conduct was not an accident triggering coverage under the homeowners policy. In moving for summary judgment, CSAA produced evidence that that was what occurred, negating the existence of liability and shifting the burden to Herrera to produce evidence of a triable issue of a fact that would establish the contrary.

Herrera makes several imaginative arguments to show the existence of a triable issue. He principally relies on the premise that, as the trial court acknowledged, the evidence creates a triable issue as to whether the first shot that injured Herrera was fired accidentally. In the trial court, Herrera relied largely on *Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076 for the proposition that coverage may exist for negligent misconduct that is separable from related criminal conduct for which there is no coverage. In that case, the insured, a seventh-grade teacher, pled nolo contendere to violating Penal Code section 288, subdivision (a) for molesting a student and was sued by the student for injuries caused both by the sexual molestation and by other harassing conduct engaged in at other times. In reversing a summary judgment for the insurer, the court held: "If the parties to a declaratory relief action dispute whether the insured's alleged misconduct should be viewed as essentially part of a proven sexual molestation, or instead as independent of it and so potentially within the policy coverage, and if the evidence pertaining to the alleged misconduct that the parties submit does not permit the court to eliminate either of these views, then factual issues exist precluding summary judgment in the insurer's favor." (4 Cal.4th at p. 1085.)

The *Horace Mann* court also implied, however, that if the covered and non-covered acts "occurred in such close temporal and spatial proximity . . . to *compel* the conclusion that they are inseparable from it for purposes of determining whether [there] is a duty to defend," coverage may be denied. (*Horace Mann Ins. Co. v. Barbara B.*, *supra,* 4 Cal.4th at p. 1084.) Indeed, "when the underlying action is a sham, the insurer can demur or obtain summary judgment on its insured's behalf and thereby obviate the necessity of further defense." (*Id.* at p. 1086.) In that case, there was no temporal or spatial proximity between the criminal conduct and multiple other incidents of wrongdoing for which coverage was sought. In the present case, as the trial court rightly recognized, "Bennett's conduct cannot be parsed into separate events or categories . . . Rather, the course of events occurred continuously all in relation to one another, and there was temporal proximity between the time Bennett prepared his weapons, drove to the shop, and discharged his guns." Even if Bennett did not intend to fire the gun that fell

from his pants, the discharge occurred shortly after he had pointed another gun at Herrera as part of an admitted attempt to rob him, and immediately before he chased Herrera into the rear of the store firing additional shots, including the shot to his abdomen. The initial firing, even if not part of Bennett's plan, cannot be considered unrelated to the intentional course of conduct in which he was engaged, for which coverage does not exist under the terms of his insurance policy or as permitted by Insurance Code section 533. (*Interinsurance Exchange v. Flores*, *supra*, 45 Cal.App.4th at pp. 671-672 [no insurance coverage for one who drove shooter to scene of shooting, knowing "that someone was likely to be shot;" "under section 533, an insurer bears no liability if the insured acted with intent to harm *or committed an inherently wrongful act without legal justification*" (italics added)]; *Studley v. Benicia Unified Sch. Dist.*, *supra*, 230 Cal.App.3d at p. 459 [Insurance Code section 533 precludes coverage where shooter insured under a homeowners policy "intentionally exposed the victim to a high probability of injury," even though shooter mistakenly believed bullets had been removed from gun's chamber].)

Neither of the cases on which Herrera places reliance is applicable. *State Farm Mutual Auto Ins. v. Partridge* (1973) 10 Cal.3d 94 merely held that where two different acts insured under different policies (an automobile policy and a homeowners policy) concurrently caused injury to a third party, coverage existed under both policies. *Safeco Ins. Co. v. Robert S.* (2001) 26 Cal.4th 758 merely held that an exclusion in a homeowners policy for an "illegal act" did not apply to an illegal act that was accidental. Neither case suggests that shooting a victim in the course of a robbery can be considered an accident within the scope of coverage if the gun discharges inadvertently.

Herrera argues that based on the evidence that Bennett told him that his family would collect $5 million life insurance benefits if he were killed and later urged Herrera to kill him, the reasonable inference can be drawn that "Bennett did not go to Herrera's store with the intent to rob it but, instead, intended to use the ruse of an attempted robbery as a means of suicide." The suggestion of course ignores the fact that Bennett pleaded nolo contendere to an attempted robbery, the equivalent for these purposes of a

guilty plea. (*Rusheen v. Drews* (2002) 99 Cal.App.4th 279, 284.) Even if Bennett's plea is not conclusive, the undisputed fact remains that he went to the store armed with multiple weapons, aimed an automatic firearm at Herrera's head in an apparent attempt to rob him, and wound up chasing Herrera to the rear of the store, shooting and wounding him a second time. (See *Merced Mutual Ins. Co. v. Mendez* (1989) 213 Cal.App.3d 41, 50 [" 'Whatever the motivation,' because [insured's] conduct was 'calculated and deliberate' [citation], it was not an 'accident' and thus not an 'occurrence' within the meaning of the policy provision."].)

Herrera next argues that "even if Bennett went to the store to rob it, the evidence makes clear that by the time the first shot occurred, Bennett had abandoned any such attempt and the shot was accidental—as was determined by the trial court." But whatever second thoughts the evidence suggests Bennett had during his 15- to 25-minute conversation with Herrera, those thoughts do not undo the fact that the initial shooting, even if inadvertent, occurred because Bennett intentionally went to the store armed with multiple weapons to commit a robbery, nor the fact that after the initial shooting Bennett chased Herrera to another room in the store and fired several more shots at him.

In arguing that the court erred in granting summary judgment on his insurance bad faith claim, Herrera argues that a defense must be provided if the facts disclose even a potential for coverage. (E.g., *Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295.) Herrera stresses the statement in *Montrose* and many other cases that "[t]he determination whether the insurer owes a duty to defend usually is made in the first instance by comparing the allegations of the complaint with the terms of the policy." (*Ibid.*) However, *Montrose* goes on to point out that extrinsic evidence can defeat the duty to provide a defense despite the allegations in the complaint. (*Id.* at pp. 296-299.) The evidence here clearly did so. CSAA rejected the initial demand for coverage based on a correct understanding of the facts as set out in the letter from its counsel (see fn. 4, *ante*.) The demands subsequently submitted to CSAA, originally by Bennett's attorney or years later by Herrera's attorney, did little more than argue that coverage existed because

the first shot Bennett fired was accidental.[7] No facts were presented suggesting anything other than that Bennett shot Herrera during the course of events that began with an attempt to rob him and ended with his shooting Herrera a second time while Herrera was attempting escape in another part of the store. CSAA and the trial court correctly determined there was never any potential for coverage of this claim, either under the terms of the insurance policy or under Evidence Code section 533.

Herrera argues that the trial court erred in considering over his objections the police report that contained considerable hearsay.[8] The issue is of limited importance because, although evidence of some incriminating statements by Bennett are contained only in the police report, the relevant events are described elsewhere in the record, including in Herrera's grand jury testimony and subsequent deposition. Therefore, we need not decide whether the police report, identified by the custodian of CSAA's records, was properly admissible as a public employee record under Evidence Code section 1280, especially insofar as it contained a party's admissions. (Compare *People v. Sanchez* (2016) 63 Cal.4th 665, 695 with *Lake v. Reed* (1997) 16 Cal.4th 448, 461; *Jackson v. Department of Motor Vehicles* (1994) 22 Cal.App.4th 730, 737.)

Thus, in exercising our independent judgment in determining the propriety of summary judgment (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 253), we conclude that CSAA met its burden of negating the possibility of liability under its homeowners policy, and that Herrera presented no evidence sufficient to create a triable issue of any material fact.

Disposition

The judgment is affirmed.

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[7] The trial court expressly rejected the significance of Bennett's claimed intoxication and medical and emotional issues that were also raised in the subsequent demands. On appeal Herrera does not contend this was error.

[8] The trial court did not rule on the objections, so that they are preserved for consideration on appeal. (Code Civ. Proc., § 437c, subd. (q).)

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POLLAK, P. J.

WE CONCUR:

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TUCHER, J.

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BROWN, J.

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